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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-387

STEPHEN KARLAN,

Petitioner,

vs.

CITY OF CINCINNATI,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered in the above entitled case on June 10, 1974, which, upon vacation and remanding by mandate of this Court, reconsidered and affirmed its previous judgment entered on June 27, 1973 affirming the criminal conviction of petitioner by the Hamilton County Municipal Court, Criminal Division, imposing upon petitioner penalty for the exercise of speech and upon which the Ohio Supreme Court created a criminal sanction and retroactively applied it against petitioner without fair notice, all of which is repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

## OPINION BELOW

The opinion of the Supreme Court of Ohio, following vacation and remanding by this Court for consideration in light of *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974), is reported at 39 Ohio St.2d 107, 314 N.E.2d 162 (1974) and printed herein as Appendix A. The previous opinion of the Supreme Court of Ohio is reported at 35 Ohio St.2d 34, 298 N.E.2d 573 (1973), and printed herein as Appendix B. The opinion of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, is unreported and is printed herein as Appendix C. The verdict of the jury, Hamilton County Municipal Court, Criminal Division, is printed herein as Appendix D. and the judgment of the Hamilton County Municipal Court is unreported and appears only as the original dockets and records of that Court. The affidavit alleging a criminal offense and instituting criminal process is printed herein as Appendix E.

## JURISDICTION

The judgment of the Hamilton County Municipal Court, Criminal Division, was entered against petitioner on January 3, 1972 convicting him of speech which was noisy, rude and insulting with the intent to annoy some person in violation of Section 901-D4 of the Cincinnati Municipal Code. The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the conviction on September 25, 1972 upon the reasoning that the ordinance, as written and as applied, was not repugnant to the Constitution of the United States. The Supreme Court of Ohio affirmed the conviction on June 27, 1973 by placing petitioner's utterances within a "fighting" category unprotected by the First and Fourteenth Amendments of the

Constitution of the United States, following its previous decision holding that the ordinance does not prohibit any constitutionally insured right, and applied the newly created rationale retroactively against petitioner. On April 15, 1974 this Court granted petitioner's petition for a writ of certiorari, No. 73-537, reported at 416 U.S. —, 94 S.Ct. 1922 (1974), and vacated the judgment of the Supreme Court of Ohio and remanded the case for further consideration in light of *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974). Upon further consideration the Supreme Court of Ohio affirmed the conviction on July 10, 1974 by construing Section 901-D4 as applying to speech which by its very utterance inflicts injury or is likely to provoke the average person to an immediate retaliatory breach of the peace, characterized by the Ohio Supreme Court as "fighting words", and applied such construction retroactively against petitioner. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 and 2101, and Part V of the Rules of this Court.

## QUESTIONS PRESENTED

The constitutional questions to be presented by this Writ of Certiorari were presented to the Hamilton County Municipal Court by written motions prior to trial, were renewed and preserved at each appropriate stage of that proceeding and during appellate review, except the questions which arose for the first time by the decisions of the Supreme Court of Ohio pertaining to its formulation of a new criminal sanction and the retroactive enforcement of that sanction against petitioner, and those questions are as follows:

(1) Whether Section 901-D4, Cincinnati Municipal Code, which provides that it is "unlawful for any person

to wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner with the intent to abuse or annoy any person," as written and as applied to speech, is repugnant to the First and Fourteenth Amendments of the Constitution of the United States, as vague and overbroad in its restraint upon the freedom of speech, where the ordinance at the time of the offense had not been judicially interpreted by any Ohio Court to be confined to a narrow and limited class of speech not entitled to constitutional protection.

(2) Whether the Supreme Court of Ohio, upon judicial review and construction of Section 901-D4, Cincinnati Municipal Code, creating a new criminal sanction penalizing speech in the "fighting" category, may apply that judicial interpretation and criminal sanction retroactively against petitioner in affirming his conviction and sentence without denying to petitioner his rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States on the basis that petitioner was afforded no fair notice at the time of the offense of the subsequent creation of a new criminal sanction.

(3) Whether the Supreme Court of Ohio's creation of a new criminal sanction through its judicial construction of Section 901-D4, Cincinnati Municipal Code, to punish speech as a criminal act utterances which inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace, is repugnant to the First and Fourteenth Amendments of the Constitution of the United States as vague and overbroad in its restraint upon the freedom of speech.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments of the Constitution of the United States and Section 901-D4, Cincinnati Municipal Code, are set forth in Appendix F herein.

## STATEMENT OF THE CASE

The petitioner was arrested by James Ward, a Cincinnati police officer and charged by affidavit with violation of Section 901-D4, Cincinnati Municipal Code, on January 19, 1971, in which the affidavit reads, in pertinent part, that "Steve Karlan, on or about the 1-19-71, 5:05 P.M., in the City of Cincinnati, Hamilton County and State of Ohio, did unlawfully and wilfully conduct himself in a noisy, rude and insulting manner, with intent to annoy some person." (Appendix E). On February 17, 1971 and March 10, 1971 petitioner filed appropriate motions in the Hamilton County Municipal Court challenging the sufficiency of the affidavit and challenging the constitutionality of Section 901-D4, Cincinnati Municipal Code, as repugnant to the First and Fourteenth Amendments of the Constitution of the United States on the basis of vagueness and overbreadth. Those motions were overruled by the trial court on March 19, 1971.

A jury was impaneled on September 22, 1971, heard evidence in the cause, and returned a verdict of guilty on September 24, 1971. (Appendix D). On November 11, 1971 petitioner was sentenced by the trial court to pay a fine of $50.00 and the cost of prosecution.[1] Petitioner

[1] At the time of the offense petitioner was a third-year law student at the University of Cincinnati. In July, 1971 he was permitted to take the Ohio Bar Examination preparatory to being admitted to the

filed his motion for new trial, challenging again the constitutionality of the ordinance on November 12, 1971, and that motion was overruled by the trial court on January 3, 1972.

During the course of the trial petitioner renewed his previous motions challenging the constitutionality of the ordinance and lodged fresh motions at the close of the City's opening statement, at the resting of the City's case in chief, and at the close of all evidence. (R. C-J, 64, 65-70, 137). The trial court overruled those motions. (R. J. 71, 137).

The trial court instructed the jury, in pertinent part:

> Before you can find the defendant guilty of disorderly conduct, the City must prove the following essential elements beyond a reasonable doubt: One — that the defendant conducted himself in a noisy, rude or insulting manner. That he did so with intent to abuse and annoy the citizens of the City of Cincinnati. That he did so unlawfully, that he did so wilfully, and that the offense, if any, was committed in the City of Cincinnati, State of Ohio. * * * Therefore, you have but four essential elements to determine and resolve: noisy, rude and insulting are words in the common vocabulary of every citizen and require no specific definition. (R. 142-143, Instruction printed herein as Appendix G).

The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the lower court by decision entered September 25, 1972 rejecting petitioner's

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practice of law in Ohio. After petitioner's conviction the Admissions Committee of the Clark County (Ohio) Bar Association was requested to investigate the conviction and to report to the Ohio Supreme Court its recommendation as to petitioner's qualifications to practice law. That Committee recommended to the Ohio Supreme Court that petitioner not be permitted admission to the Ohio Bar as unqualified. That recommendation currently stands.

claim that the ordinance was repugnant to the Constitution and finding that it was neither vague nor overbroad as written or as applied to speech. (Appendix C).

On June 27, 1973 the Supreme Court of Ohio entered its opinion concluding that the words uttered by petitioner were unmistakably in the "fighting" category and as such were unprotected expression under the First Amendment. The Ohio Supreme Court, in affirming petitioner's conviction, apparently formulated a new rule of law for Ohio without incorporating that new rationale into the ordinance, reasoning that it had previously considered the constitutional status of the ordinance, found that the ordinance did not prohibit the lawful exercise of any constitutional right, and in effect retroactively applied a judicial interpretation against petitioner who had no fair notice of such a construction at the time of the offense. (Appendix B).

Petitioner thereafter filed his Petition for a Writ of Certiorari with this Court as No. 73-537 and on April 15, 1974 this Court granted the petition, vacated the judgment and remanded the cause to the Supreme Court of Ohio for further consideration in light of *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

After further consideration of the cause, with three Justices dissenting, the Supreme Court of Ohio entered its opinion on July 10, 1974 concluding that Section 901-D4, Cincinnati Municipal Code, may punish speech which by its very utterance inflicts injury or is likely to provoke the average person to an immediate retaliatory breach of the peace, holding that where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to an immediate retaliatory breach of the peace, they are fighting words, and

the utterance thereof may be punished as a criminal act. The Ohio Supreme Court, in affirming petitioner's conviction after further consideration, judicially construed the Cincinnati ordinance to apply to petitioner's utterances and thereby retroactively applied such judicial interpretation against petitioner who had no fair notice of such construction at the time of the offense. (Appendix A).

Petitioner, assisting a friend in repairing her damaged vehicle which was on the parking lot of the Cincinnati Police, engaged in a conversation with Patrolman Ward while his partner, Patrolman Norman Stewart was standing several feet away. That conversation was characterized by Patrolman Stewart as a loud conversation, the words of which he could not discern, in which the voices as heard by him were of equal volume and muffled. (R. 47-48, 50-51).

The evidence concerning that conversation was in conflict at the trial. Patrolman Ward testified that on one occasion petitioner stated, "I hate all of you fucking cops," and on three occasions said, "Prick-assed cop." (R. 33, 35, 41). Petitioner testified that he told the officer he was acting "childish" and that he was "silly and foolish." (R. 94, 104, 106, 107). Patrolman Stewart testified that at the time petitioner came into his presence under the arrestive custody of Patrolman Ward that petitioner apologized for saying that the officer was acting silly and foolish. (R. 51-52).

Patrolman Ward testified that he had heard the vulgar epithets many times in the past and that he was not angered by the words. (R. 12, 21-23, 29-32).

## REASONS FOR GRANTING WRIT

This case involves substantial constitutional issues concerning the State's power to regulate speech in the face of the Constitution and the denial to petitioner of fair notice and warning by the Ohio Supreme Court's creation of a legal rationale applied retroactively against petitioner in the face of the Due Process Clause of the Fourteenth Amendment.

In part, this case involves the question of the sensitive tools which a State must constitutionally employ through either legislative enactment or judicial process in the application of a standard for the separation of protected speech from speech which may be regulated. The operative terms of the ordinance, the premise upon which the trial was conducted, are chameleons of altering meaning directed to the variable sensibilities of different individuals. Here speech was regulated on the pure premise that the operative terms of the ordinance could be defined by the common vocabulary of every citizen where such terms may annoy some individual. The Ohio Supreme Court interchanged the terms of the ordinance for those which fit within previous decisions of this Court permitting the regulation of speech without defining any new term.

The ordinance here permits regulation of speech critical of police and the excising from public discourse sexual slang, in the absence of any showing that the speech was uttered in other than peaceful means and that the words were in a significant way erotic.

Petitioner, by the decisions of the Ohio Supreme Court, was denied fair notice of the conduct sought to be regulated and denied due process of law by that Court's retroactive application of its rationale against petitioner. Petioner's conviction and sentence was affirmed by the Ohio

Supreme Court under an ordinance having a totally different meaning than it did at the time of the offense and its subsequent trial.

With regard to all issues raised, the ruling below is in conflict with the applicable decisions of this Court concerning each issue raised.

## I

**WHETHER SECTION 901-D4, CINCINNATI MUNICIPAL CODE, WHICH PROVIDES THAT IT IS "UNLAWFUL FOR ANY PERSON TO WILFULLY CONDUCT HIMSELF OR HERSELF IN A NOISY, BOISTEROUS, RUDE, INSULTING OR OTHER DISORDERLY MANNER WITH THE INTENT TO ABUSE OR ANNOY ANY PERSON," AS WRITTEN AND AS APPLIED TO SPEECH, IS REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, AS VAGUE AND OVERBROAD IN ITS RESTRAINT UPON THE FREEDOM OF SPEECH, WHERE THE ORDINANCE AT THE TIME OF THE OFFENSE HAD NOT BEEN JUDICIALLY INTERPRETED BY ANY OHIO COURT TO BE CONFINED TO A NARROW AND LIMITED CLASS OF SPEECH NOT ENTITLED TO CONSTITUTIONAL PROTECTION.**

The ordinance as drawn and as applied by the trial court against petitioner fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden and the ordinance encourages arbitrary and erratic arrests

and convictions. *Lanzetta* v. *New Jersey*, 306 U.S. 51 (1938); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1925); *Thornhill* v. *Alabama*, 310 U.S. 88 (1939); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972). The ordinance fails to possess the necessary narrow and limited standard for application in the sensitive area of separating protected expression from unprotected speech, thereby sweeping all speech within its punishable area, failing to possess an ascertainable standard of guilt in the delicate First Amendment situation. *Winters* v. *New York*, 333 U.S. 507 (1948); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676 (1968).

The ordinance must be viewed as it existed at the time of the offense and at the time of trial under the instruction to the jury. *Stromberg* v. *California*, 283 U.S. 359 (1931); *Terminiello* v. *City of Chicago*, 337 U.S. 1, 5-6 (1949); *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966). Subsequent alteration of the ordinance upon appellate review cannot change the constitutional issue raised in the trial court and upon which conviction ensued. *Terminiello* v. *City of Chicago*, *supra*, 5-6; *Ashton* v. *Kentucky*, *supra*, 198.

The instruction to the jury (Appendix G) defined the terms of the ordinance only within the meaning of the common vocabulary of every citizen. This Court has previously ruled similar terms (boisterous, loud and flamboyant) as too vague and indefinite in a First Amendment situation concerning a breach of the peace statute. *Edwards* v. *South Carolina*, 372 U.S. 229, 233, 238 (1963).

The ordinance here accomplished the regulation of speech merely upon the basis that it was uttered with the intent to abuse or annoy some person. Speech which is calculated to create disturbances of the peace, corrupt pub-

lic morals, stir the public to anger, invite disputes, and bring about conditions of unrest is entitled to the protection of the First Amendment. *Ashton* v. *Kentucky*, 384 U.S., at 198, 200; *Terminiello* v. *City of Chicago*, 337 U.S., at 3-4. Here regulation can be accomplished simply upon the premise that it may annoy some person, a circumstance that leaves wide open the standard of responsibility [*Ashton* v. *Kentucky*, 384 U.S., at 200], in which the crucial term "annoy" possesses the constitutional repugnancy of no standard of conduct being specified and does not indicate upon whose sensitivity a determination must rest. *Coates* v. *City of Cincinnati*, 402 U.S. 611, 613-614 (1971). The ordinance's term "annoy" imposes a subjective standard employing undefined sensitivity.

The Constitution protects criticism of public men such as police officers even where the speech is foolish and without moderation. *Baumgartner* v. *United States*, 322 U.S. 665, 673-674 (1944). The First Amendment protects the citizen's prerogative to express to that police officer that that officer is silly and foolish, that he is acting childish, and that the citizen hates all police officers. The Constitution protects, as well, utterances such as "Fuck the Draft" [*Cohen* v. *California*, 403 U.S. 15, 16 (1971)], "White son of a bitch, I'll kill you" [*Gooding* v. *Wilson*, 405 U.S. 518, 519 (1972)], and "you god damn m.f. police – I am going to [the Superintendent of Police] about this" [*Lewis* v. *City of New Orleans*, 415 U.S. 130, 131 (1974)] unless proscribed by a narrow and limitedly drawn regulation.

The subject ordinance does not afford notice that certain kinds of speech would not be tolerated in certain areas: the ordinance as applied in the instant case demonstrates that the only person hearing the utterances [Patrolman Ward] was not violently aroused, and was, in fact,

not even angered, and that the only other person [Patrolman Stewart] in the vicinity did not hear the utterances, and the sexual vulgarisms employed were insufficient to conjure up such psychic stimulation in the audience to amount to an obscenity and come within the prohibitions of *Roth* v. *United States*, 354 U.S. 476 (1957), by being in a significant sense erotic. *Cohen* v. *California*, 403 U.S., at 19-20. The Ohio Supreme Court in its consideration of this cause did not consider the speech uttered by petitioner to be obscene. *City of Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 110 (1974).

This ordinance either upon a theory that the City of Cincinnati can excise as "disorderly conduct" two particular scurrilous epithets from the public discourse, or upon the theory that their use is inherently likely to cause violent reaction, even accepting that some persons with lawless and violent proclivities might react to the epithets, the ordinance is still insufficient, consistent with constitutional values, to support the intervention and related regulation by the City of Cincinnati. *Cohen* v. *California*, *supra*, 23.

The State cannot regulate opprobrious, abusive, and obscene speech (even wanton cursing and reviling a police officer while in the actual performance of his duties) pursuant to legislative enactments far more narrow than the terms of this ordinance, under a scheme of breach of the peace or disorderly conduct. *Gooding* v. *Wilson*, 405 U.S., at 522, 525, 527; *Ashton* v. *Kentucky*, 384 U.S., at 200; *Lewis* v. *City of New Orleans*, 415 U.S., at 132-133. A standard allowing juries, as here, to determine guilt measured by common understanding and practice effectively licenses those juries to create their own standards in each case, a concept repugnant to the First and Fourteenth Amendments. *Gooding* v. *Wilson*, *supra*, 528; *Herdon* v. *Lowry*, 301 U.S. 242, 263 (1937).

In the past this Court has recognized a right possessed by the States to regulate a class of speech designated as "fighting words" as unprotected expression. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). However, the New Hampshire Court had specifically limited its statute by authoritative interpretation before Chaplinsky offended the construed statute. Cf. *Gooding* v. *Wilson*, 405 U.S., at 522-523. Here the Ohio Court had not limited the ordinance before petitioner's offense and subsequent trial. During petitioner's appeal the Ohio Supreme Court construed the ordinance as constitutional without judicial modification in *City of Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163, 285 N.E.2d 714 (1972), certiorari denied 410 U.S. 920 (1973), and adhered to the *Hoffman* principle when this cause was first before that Court. *City of Cincinnati* v. *Karlan*, 35 Ohio St.2d 34, 39-40 (1973).

This cause finds significant similarity to *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974). Both cases involve sexual vulgarisms directed to a police officer, both involve sharp contradictions as to the respective versions of the words exchanged between citizen and police officer, both were granted certiorari, vacated and remanded for consideration in light of the cause determined by this Court during the pendency of appeal [*Gooding* v. *Wilson* in the circumstance of *Lewis* and *Lewis* v. *City of New Orleans* in the circumstance of *Karlan*], and each upon reconsideration by the respective highest appellate court of the jurisdiction were affirmed with three judges dissenting to require in both cases the re-submission of the constitutional claims again to this Court. *Lewis* v. *City of New Orleans*, 415 U.S., at 131-132.

The offense was alleged by the affidavit of Patrolman Ward [Appendix E] and the case was presented on a theory that petitioner's speech was noisy, rude and insulting and

uttered with the intent to annoy or abuse a citizen of Cincinnati, in which the jury was instructed that the operative terms of the ordinance: noisy, rude and insulting; were words in the common vocabulary of every citizen and require no specific definition. (Appendix G). The repugnancy to free speech of petitioner's conviction is clearly presented by *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949), again in *Gooding* v. *Wilson*, 405 U.S. 518 (1972), and once again in *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974), and the guidance afforded by those cases has gone unheeded by the Courts of Ohio. Cf. *Karlan* v. *City of Cincinnati*, 416 U.S. ——, 94 S.Ct. 1922, 1924-1925 (1974) (Douglas J., dissenting).

It is, therefore, submitted that Section 901-D4, Cincinnati Municipal Code, is repugnant to the First and Fourteenth Amendments of the Constitution of the United States and is a restraint upon freedom of speech requiring this Court to reaffirm existing principles.

## II

**WHETHER THE SUPREME COURT OF OHIO, UPON JUDICIAL REVIEW AND CONSTRUCTION OF SECTION 901-D4, CINCINNATI MUNICIPAL CODE, CREATING A NEW CRIMINAL SANCTION PENALIZING SPEECH IN THE "FIGHTING" CATEGORY, MAY APPLY THAT JUDICIAL INTERPRETATION AND CRIMINAL SANCTION RETROACTIVELY AGAINST PETITIONER IN AFFIRMING HIS CONVICTION AND SENTENCE WITHOUT DENYING TO PETITIONER HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES ON THE BASIS THAT PETITIONER WAS AFFORDED NO FAIR NOTICE AT THE TIME OF THE OFFENSE OF THE SUBSEQUENT CREATION OF A NEW CRIMINAL SANCTION.**

Petitioner was arrested and subsequently convicted and sentenced for being noisy, rude and insulting with the intent to annoy some person. (Appendix E and G).

The Supreme Court of Ohio affirmed petitioner's conviction and applied the sentence against him not on the basis that his utterances were noisy, rude and insulting with the intent to annoy some person, but upon the premise that petitioner's expressions were epithets unmistakably in the "fighting" category and formulated a principle of law that where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to a retaliatory breach of the peace, they are fighting words and the utterance thereof may be pun-

ished as a criminal act. The ordinance as construed was applied retroactively to petitioner.

Petitioner's conviction was affirmed under an ordinance with a meaning quite different from the one he was charged with violating and for that reason alone the conviction cannot stand. *Rabe* v. *Washington*, 405 U.S. 313, 315 (1972). "To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that the statute give fair notice that certain conduct is proscribed." *Rabe* v. *Washington*, *supra*, 315. Here the ordinance under which petitioner was prosecuted made no mention that epithets likely to provoke the average person to a retaliatory breach of the peace were fighting words and punishable and as such an element of the offense somehow modifying the ordinance's words "noisy, rude and insulting" with the intent to "annoy." *Rabe* v. *Washington*, 405 U.S., at 315.

It is as constitutionally repugnant to convict an accused on a charge for which he was never tried as upon a charge that was never made. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); cf. *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969). The ordinance was enlarged from its simple language "annoy" to provocation of a breach of the peace by the Ohio Supreme Court, a circumstance which is at war with the fundamental concept that crimes must be defined with appropriate definiteness. *Pierce* v. *United States*, 314 U.S. 306, 311 (1941). The vice of the vagueness of this ordinance cannot be cured within this case by a construction placing arguable valid limits on the ordinance because there was inadequate guidance both to petitioner and the jury. *Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964). The unforeseeable alteration of this ordinance, applied retroactively to petitioner, operates precisely like an *ex post facto* law forbidden by Art. I, § 10 of the Constitution, and the Ohio Supreme Court is barred by the Due Process Clause

of the Fourteenth Amendment from achieving exactly the same result by judicial construction that the Ohio legislature is denied in the enactment of an *ex post facto* law. *Bouie* v. *City of Columbia*, *supra*, 353-354.

Under the circumstances of this case the question of whether the content of petitioner's words were derisive, fighting words is an issue which cannot now be reached in this case and which could not be reached by the Ohio Supreme Court. *Terminiello* v. *City of Chicago*, 337 U.S. 1, 3-4 (1949).

It is, therefore, submitted that the Ohio Supreme Court's retroactive application of its rule significantly altering the crime under which petitioner was charged and convicted is a denial of due process of law repugnant to the Fourteenth Amendment of the Constitution of the United States requiring this Court to reaffirm existing principles.

## III

## WHETHER THE SUPREME COURT OF OHIO'S CREATION OF A NEW CRIMINAL SANCTION THROUGH ITS JUDICIAL CONSTRUCTION OF SECTION 901-D4, CINCINNATI MUNICIPAL CODE, TO PUNISH SPEECH AS A CRIMINAL ACT UTTERANCES WHICH INFLICT INJURY OR ARE LIKELY TO PROVOKE THE AVERAGE PERSON TO AN IMMEDIATE RETALIATORY BREACH OF THE PEACE, IS REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES AS VAGUE AND OVERBROAD IN ITS RESTRAINT UPON THE FREEDOM OF SPEECH.

The sexual vulgarisms uttered here may have conveyed disgrace and could be considered harsh, insulting language, they did not, however, even anger the person to whom they were directed, which, as such, fails to "tend" to incite an immediate breach of the peace. *Gooding* v. *Wilson*, 405 U.S. 518, 525 (1972); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942).

The rationale of the Ohio Supreme Court, in both of its majority opinions, at most reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right of freedom of expression." *Cohen* v. *California*, 403 U.S. 15, 23 (1971); cf. *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969). The Court's attempt to alter the natural person (a police officer) to whom the remarks were directed to the hypothetical "average person" does not escape the proposition that "There may be some persons about with such lawless and violent proclivities, but that is an insuf-

ficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." *Cohen* v. *California*, 403 U.S., at 23. The entire rationale of the Ohio Supreme Court insecurely rests upon that insufficient base and its decision is inconsistent with constitutional values.

The central inquiry must lie in the premise that where the means of expression are peaceful, the communication need not meet standards of acceptability. *Cohen* v. *California, supra*, 25; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971). To be sure, the epithets uttered could be considered harsh, crude language, but "one man's vulgarity is another's lyric" [*Cohen* v. *California*, 403 U.S., at 25], and in considering the dialogue of the street the exercise of taste by the trier of fact as a judgmental standard cannot square with constitutional guarantees. A significant constitutional distinction is present between advocacy of unpopular ideas — the selection of distasteful sexual vulgarisms — even to the extent of theory and expression of violence, and speech carefully directed to inciting and directing an audience to immediate violence. See *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

To label offensive, distastful words — street language — as being within the "fighting" category fails to meet the constitutional standard of how one is to distinguish those offensive words from any other offensive word. *Cohen* v. *California, supra*, 25. In the first instance, the rationale of the Ohio Supreme Court, in both of its opinions, fails to establish any concrete guidelines to establish what words are within a "fighting" category and how any person distinguishes words and situations which may be regulated as opposed to those which are constitutionally protected. In the second instance, the "clear and present danger" test

creating a First Amendment exception in *Schenck* v. *United States*, 249 U.S., 47 (1918), and the exception regulating derisive, fighting words in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), should be reconsidered by this Court. Cf. *Brandenburg* v. *Ohio*, 395 U.S., at 450 (opinion of Douglas, J.).

The Supreme Court of Ohio during its first consideration of the subject ordinance under challenge for vagueness and overbreadth of its terms "noisy, rude and insulting with intent to annoy" altered the subjective labels to "wilfully directed epithets which are likely to provoke the average person to a retaliatory breach of the peace" and as such "they are fighting words", which remained subjective labels, and the Court did so upon the basis that "It is obvious to us that the epithets shouted by the instant appellant were unmistakably in the 'fighting' category" notwithstanding that Court's acceptance of the uncontraverted testimony of the police officer that the utterances failed to move him to anger or violence. *City of Cincinnati* v. *Karlan*, 35 Ohio St.2d 34, 42-43 (1973). During the second consideration of the subject ordinance the Court noted that where "the words of rudeness or insult reach a point where they become 'fighting words' they may be regulated by criminal statute and their utterance may be constitutionally punished" and again affirmed the conviction. *City of Cincinnati* v. *Karlan*, 39 Ohio St.2d 107, 109 (1974). Except and to the extent of the use of labels, "fighting words" is no more precise than "noisy, rude and insulting", and, particularly, no point of demarcation from rudeness or insult to "fighting word" is achieved.

Acceptance of the *Chaplinsky* doctrine only substitutes one vague, subjective term for another, ignores the Model Penal Code § 250.1, Comments 14 (Tent. Draft No. 13, 1961), and enhances the opportunity for abuse, as here.

where the ordinance on its face, or as subsequently construced, still "confers on police a virtually unrestrained power to arrest and charge persons with a violation * * * * (M)ade in 'one-on-one' situations where the only witnesses are the arresting officer and the person charged" in which "All that is required for conviction is that the court accept the testimony of the officer." *Lewis* v. *City of New Orleans*, 415 U.S. 130, 135-136 (1974) (concurring opinion, Powell, J.); Cf. 415 U.S., at 132 footnote 2.

This ordinance as judicially interpreted continues to encourage arbitrary and erratic arrests and convictions. *Thornhill* v. *Alabama*, 310 U.S. 88 (1939); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972). The ordinance as construed continues to sweep all speech within its punishable area because it fails to possess an ascertainable standard of guilt in the delicate First Amendment situation. *Winters* v. *New York*, 333 U.S. 507 (1949); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676 (1968). As construed the ordinance depends upon the sensitivity of those possessed with the power of determination as to the relative degree of the offensiveness of the speech selected and as such possesses no comprehensible normative standard, in which the violation depends entirely upon whether or not the policeman is annoyed, notwithstanding the factual situation that the officer involved was not even angered but the words uttered offend the sensibilities of the trier of fact simply because of the coarseness, harshness and sexual vulgarism expressed. *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). Those who are empowered to apply the law have no clear and explicit standard to guide them. *Coates* v. *City of Cincinnati*, 402 U.S., at 614, *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90-91 (1965).

Words which provoke an assault and battery have never been considered as justification for that altercation. The criminal sanction imposed upon the transgressor to refrain from assaulting the person of another is sufficient to maintain good order without resort to the additional criminal sanction imposed upon the victim by regulating the speech which may sponsor that assault because some citizens may possess such proclivities. The balancing of constitutional values requires that violent conduct be punished and speech be free from State intervention and regulation, whereby balance is struck and good order maintained.

It is, therefore, submitted that the position taken by the Ohio Supreme Court is repugnant to the First and Fourteenth Amendments of the Constitution of the United States as a restraint upon the freedom of speech, requiring this Court to reaffirm existing principles and to define the nature of State intervention into First Amendment rights to safeguard against suppression of speech.

## CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

IN THE SUPREME COURT OF OHIO

---

CITY OF CINCINNATI,

Appellee,

vs.

STEVE KARLAN,

Appellant.

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1. Under Section 901-d4, Code of Ordinances of Cincinnati, persons may not be punished for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words by their very utterance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace. (*Cantwell* v. *Connecticut*, 310 U.S. 296; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Terminiello* v. *Chicago*, 375 U.S. 1; *Cohen* v. *California*, 403 U.S. 15; *Gooding* v. *Wilson*, 405 U.S. 518; *Lewis* v. *New Orleans*, U.S. , 39 L.Ed.2d 214.)

2. Where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to an immediate retaliatory breach of the peace, they are fighting words, and the utterance thereof may be punished as a criminal act. (*Cantwell* v. *Connecticut*, 310 U.S. 296; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Cohen* v. *California*, 403 U.S. 15; *Gooding* v. *Wilson*, 405 U.S. 518.)

3. Where a defendant has been asked by a uniformed police officer if he has permission to tamper with an automobile parked in a police impoundment area and responds with the shouted statement, "I hate all of you fucking cops," and upon the officer's further inquiry states, "get out of my way you fucking, prick-ass cops," and, thereafter, twice calls the officer a "prick-assed cop," Section 901-d4, Code of Ordinances of Cincinnati, as limited and construed herein, represents a constitutional criminal prohibition against the speaking of such words under such circumstances, since the words, under those circumstances, are fighting words and do not constitute speech which is protected by the First and Fourteenth Amendments to the United States Constitution.

(No. 72-842—Decided July 10, 1974.)

ON REMAND from the United States Supreme Court.

The facts in this case are set out in our original opinion. *Cincinnati* v. *Karlan* (1973), 35 Ohio St. 2d 34, 298 N. E. 2d 573.

*Mr. Thomas A. Luebbers,* city solicitor, *Mr. Ralph E. Cors* and *Mr. John S. Moraites* and *Miss Dolores Hildebrandt,* for appellee.

*Mr. Andrew B. Dennison,* for appellant.

HERBERT, J. Following our judgment in this case, appellant appealed to the United States Supreme Court. Under a mandate of May 14, 1974, that court vacated our judgment and remanded the cause to this court for further consideration in light of *Lewis* v. *New Orleans* (1974), U.S. , 39 L. Ed. 2d 214, which was decided subsequent to the publication of our first opinion.

The next to last paragraph of the majority opinion in *Lewis* states:

"In sum * * * [the New Orleans ordinance under consideration] punishes only spoken words. It can therefore withstand appellant's attack upon its facial constitutionality only if, as authoritatively construed by the Louisiana Supreme Court, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. * * * Since * * * [the ordinance], *as construed by the Louisiana Supreme Court*, is susceptible of application to protected speech, the section is constitutionally overboard and therefore is facially invalid." (Emphasis added.)

As we read *Lewis*, and the cases cited therein, the apparent deficiency found in our first opinion in *Karlan* centers around a reliance in that case upon the construction of Cincinnati Ordinance 901-d4, which is contained in *Cincinnati* v. *Hoffman* (1972), 31 Ohio St. 2d 163, 285 N. E. 2d 714, certiorari denied, 410 U. S. 920. Since *Hoffman* involved only conduct, and *Karlan* only speech, the conclusion from *Lewis* and the remand now before us is that an authoritative statutory construction pertaining to conduct may not be relied upon in a case involving speech, even though it be obvious that the particular speech under consideration is not constitutionally protected.

Cincinnati Ordinance 901-d4 reads, as follows:

"It shall be unlawful for any person to wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city or any portion thereof."

Viewed in light of *Lewis* v. *New Orleans, supra*, it is clear that this ordinance does not punish "only spoken words." However, it is just as apparent that it is capable

of punishing spoken words and, in that respect, must be authoritatively narrowed or be held constitutionally overbroad.

A considerable line of United States Supreme Court cases has consistently, and insistently, held that the uttering of words which are "rude" or "insulting" may not be prohibited, "although vulgar or offensive." *Id.*, at page 219. However, as noted in the syllabus of our original *Karlan*, when the words of rudeness or insult reach a point where they become "fighting words" they may be regulated by criminal statute and their utterance may be constitutionally punished.

As has been made abundantly clear by the United States Supreme Court, a criminal statute capable of punishing spoken words cannot stand constitutional muster unless "authoritatively construed" by state courts to be inapplicable to speech which is protected by the First and Fourteenth Amendments. *Lewis, supra,* and cases cited.

The principal pull and haul between state courts and the high court has centered around a definition of "protected speech." However, there appears to be no room left for argument today. A majority of the United States Supreme Court has said that no matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unles they are fighting words,[1] as defined by that tribunal. Futhermore, the court has stated that those descriptive words in and of themselves are constitutionally overbroad and must be rendered unsusceptible

[1] We are not here dealing with another troublesome word, "obscene." Suffice it to say, however, it would appear that the high court has concluded to date that no spoken words are obscene unless they serve to erotically stimulate. *Cohen* v. *California* (1971), 403 U. S. 15, 20.

of application to protected speech by appropriate judicial decision.

Therefore, persons may not be punished under Section 901-d4, Code of Ordinances of Cincinnati, for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words by their very utterance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace. *Cantwell* v. *Connecticut* (1940), 310 U.S. 296; *Chaplinsky* v. *New Hampshire* (1942), 315 U. S. 568; *Terminiello* v. *Chicago* (1949), 337 U. S. 1; *Cohen* v. *California* (1971), 403 U. S. 15; *Gooding* v. *Wilson* (1972), 405 U. S. 518; *Lewis* v. *New Orleans, supra.*

Insofar as appellant Karlan is concerned, we adhere to our former judgment. For, where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to an immediate retaliatory breach of the peace, they are fighting words and the utterance thereof may be punished as a criminal act. *Cincinnati* v. *Karlan, supra* (35 Ohio St. 2d 34.)

*Judgment reaffirmed.*

CORRIGAN, CELEBREZZE and P. BROWN, JJ., concur.

O'NEILL, C. J., STERN and W. BROWN, JJ., dissent.

O'NEILL, C. J., dissenting. The ordinance in question here, Cincinnati Ordinance 901-d4, neither mentions nor is concerned with spoken words. Yet the majority adheres to the former judgment of this court on the ground that defendant's utterances are fighting words which are punishable as a criminal act.

As noted in *Gooding* v. *Wilson* (1972), 405 U. S. 518, 523, the decisions of the United States Supreme Court "since *Chaplinsky* [*Chaplinsky* v. *New Hampshire* (1942),

315 U. S. 568] have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression * * *."

In my opinion, Cincinnati Ordinance 901-d4 is not a "carefully drawn" proscription of unprotected speech and is "susceptible of application to protected expression." Therefore, it is "constitutionally overbroad and * * * is facially invalid." *Lewis* v. *New Orleans* (1974), U.S. , 39 L. Ed. 2d 214, 220.

W. BROWN, J., concurs in the foregoing dissenting opinion.

STERN, J., dissenting in part. Although I agree with the first two paragraphs of the syllabus in this case, I am constrained to dissent from the majority's judgment because I believe that appellant is entitled to a new trial.

What Justice Herbert has ably accomplished by his opinion is to limit the application of Cincinnati Ordinance 901-d4 to speech not protected by the United States Constitution. This was necessary because the ordinance was overly broad, and therefore susceptible of being struck down as facially unconstitutional.

Appellant was, however, convicted of violating the constitutionally suspect Ordinance 901-d4. In my view, that fact entitles him to have the criminality of his language specifically determined under the standards announced by the majority, and by a panel of jurors in whom we should repose the initial responsibility for judging the "fighting" nature of appellant's words.[2]

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[2] The "harmless error" standard of *Chapman* v. *California* (1967), 386 U. S. 18, has no application where the error complained of goes to the essential nature of the crime charged.

## APPENDIX B

---

IN THE SUPREME COURT OF OHIO

---

CITY OF CINCINNATI,

Appellee,

v.

KARLAN,

Appellant.

---

Where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to a retaliatory breach of the peace, they are fighting words and the utterance thereof may be punished as a criminal act. (*Cantwell* v. *Connecticut*, 310 U. S. 296; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Cohen* v. *California*, 403 U. S. 15; *Gooding* v. *Wilson*, 405 U. S. 518.)

(No. 72-842—Decided June 27, 1973.)

APPEAL from the Court of Appeals for Hamilton County.

On January 19, 1971, appellant was arrested by a Cincinnati police officer for an alleged violation of that city's "disorderly conduct" ordinance. (Section [illegible]1-d4, Cincinnati Municipal Code). The cause was tried to a jury in the Hamilton County Municipal Court, and on September 24, 1971, appellant was found guilty. He was sentenced to pay a fine of $50 and the costs of the proceeding.

The arrest and subsequent conviction stemmed from appellant's alleged direction of abusive language at the ar-

resting officer. In his motion for new trial and upon appeal to the Court of Appeals, appellant challenged the constitutionality of the ordinance, both upon its face and as applied, as being repugnant to the First and Fourteenth Amendments to the Constitution of the United States. Specifically, it was his contention that he was convicted only for what he said and not for any conduct that the ordinance proscribed. In addition, he challenged the admission of evidence at his trial, over objection, relating to his prior arrest for assault and battery, since there was no evidence that it had resulted in a criminal conviction.

The Court of Appeals, finding no merit in any of appellant's claims, affirmed the judgment of conviction. The cause is now before this court pursuant to our allowance of a motion for leave to appeal.

*Mr. Thomas A. Luebbers*, city solicitor, *Mr. Ralph E. Cors* and *Mr. John S. Moraites* and *Miss Dolores Hildebrandt*, for appellee.

*Mr. Andrew B. Dennison*, for appellant.

HERBERT, J. At the trial of this cause, the arresting officer testified upon direct examination as follows:

"Q. Directing your attention to that date, did you have occasion to come in contact with the defendant, Steve Karlan?

"A. Yes, sir; I did.

"Q. Tell the jury on what date and what time you first came in contact with him.

"A. It was January the 19th, this year, at about 5:05 p. m.

"Q. Where did you see him?

"A. In the rear lot of District 3's police station.

"Q. Where is District 3 located?

"A. 3201 Warsaw Avenue.

"Q. Is that in Cincinnati, Hamilton County, state of Ohio?

"A. Yes, sir; it is.

"Q. Prior to January the 19th, did you have any contact with the defendant?

"A. No, sir; I didn't.

"Q. Had you ever seen him before?

"A. No, sir.

"Q. Your first contact was January 19th, at 5:00 o'clock p. m., at District 3?

"A. Yes, sir.

"Q. When you arrived at the District on that date, what called your attention to the defendant?

"A. The defendant was tampering with an automobile parked on the police lot.

"Mr. Dennison [defense counsel]: I am going to have to object to the word 'tampering.'

"The Court: Sustained as to the word, 'tampering.' Just describe what you saw with regards to this car.

"A. (continuing) He was doing something with the automobile parked on District 3's lot.

"Q. Was he in the front of the car or in the back?

"A. In front of it.

"Q. Was he looking under the hood or on top of the car?

"A. He had the hood up.

"Q. Were his arms inside of the car?

"A. I don't remember.

"Q. Did you see him remove anything from the car?

"A. No, sir.

"Q. Did you see him with anything in his hands, at any time, that afternoon?

"A. Yes, sir.

"Q. What time did you see this?

"A. After I got out of my automobile. He had a radiator in his hands, an automobile radiator.

"Q. Can you recall where he had obtained the radiator?

"A. No, I don't know where he obtained it.

"Q. After you saw him with the radiator, did you approach the defendant?

"A. Yes, sir; I did.

"Q. What was your reason for walking up towards the defendant?

"A. We've had several things taken from automobiles impounded at District 3's lot, and anyone who takes a car, or part of a vehicle from the lot, has to have a release from the district station to take anything from the car or the vehicle, itself.

"Q. How much time, at this point, had lapsed from the time you pulled up to the District until you first walked up and had the conversation with the defendant?

"A. A couple of minutes, I guess.

"Q. Was any one with you when you pulled into the lot?

"A. Yes, there was.

"Q. Who was with you?

"A. Patrolman Norman Stewart.

"Q. Is he your partner?

"A. He was my partner that date.

"Q. When you got out of your car, what did Patrolman Stewart do?

"A. When we pulled in, we moved to the left of the parking space and Patrolman Stewart went into the garage area and I went to the rear lot.

"* * *

"Q. Were there any other vehicles in the parking lot at the time?

"A. Yes, sir; there was.

"Q. Were there police cruisers or other cars?

"A. There were both. There were other cars and police cars.

"Q. Were there other impounded cars on the lot? Do you know?

"A. The only cars that are allowed on the lot are city vehicles and the impounding lot.

"Q. Were you and your partner in full uniform at the time?

"A. Yes, sir.

"Q. Were you operating the police cruiser or was your partner operating the police cruiser?

"A. I don't remember who was driving that day, but we were in a police car, a marked police car.

"Q. Was any one else out in the lot?

"A. No, sir.

"Q. Did you see any one, any time, during the conversation that you had with the defendant?

"A. I did not.

"Q. As you approached the defendant, who spoke first?

"A. The defendant did.

"Q. What did he say to you?

"A. He asked me what I was looking at.

"Q. What was your response?

"A. I asked him if he had permission to tamper with this car.

"Q. What was his response to that?

"A. He said, 'I hate all of you fucking cops.'

"Q. Did he appear to be angry at this time?

"A. He appeared to be wild.

"Q. Tell the jury what he was wearing at the time. How was he dressed?

"A. He was wearing slacks and a jacket. I don't remember the color.

"Q. He wasn't in a coat and a tie?

"A. No, sir; he was not.

"Q. You say he appeared wild. When he had conversation with you, was this normal conversation, or was he shouting?

"A. He was shouting.

"Q. Demonstrate to the jury, repeating the conversation, the initial conversation, demonstrate exactly how loud he said it to you. Just shout it out the way he shouted it out.

"A. (Demonstrating) He said, 'I hate all you fucking cops.'

"Q. After he said that to you, what did you do?

"A. I said, 'Wait a minute.' I said, 'Do you have permission to fool with this automobile?'

"Q. What did he say at this point?

"A. He said, 'Get out of my way you fucking, prick-ass cops.'

"Q. What was your response to this?

"A. At this time I stopped him from going to the car and I warned him about his language.

"Q. Then, what did he say?

"A. He called me a 'prick-ass cop' again.

"Q. Now this was the second time?

"A. This was the third time.

"Q. Then what did you do?

"A. Then I told him, I warned him again, and he called me a 'prick-assed' cop again.

"Q. Did you tell him that if he said it again you were going to arrest him?

"A. The fourth time — Before the fourth time, I put him under arrest.

"Q. What happened immediately after you placed him under arrest?

"A. I just took him by the arm and started leading him to the District.

"Q. Did he have any other conversation with you at this point?

"A. He just told me I couldn't do it."

Section 901-d4, Cincinnati Municipal Code, reads as follows:

"It shall be unlawful for any person to willfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person * * *."

As construed by this court, the above ordinance has recently been held not to prohibit the lawful exercise of any constitutional right or the lawful enjoyment of any constitutionally protected freedom. *Cincinnati* v. *Hoffman* (1972), 31 Ohio St. 2d 163, 285 N. E. 2d 714, certiorari denied — U.S. —, 35 L.Ed. 2d 583.[1]

However, appellant contends that *Hoffman* involved conduct and the case at bar concerns only speech. Thus, he reasons, the two causes are distinguishable and the ordinance is constitutionally defective under the facts at bar. To reach this conclusion, appellant is driven to categorize the language he employed as being constitutionally protected freedom of expression. To gain that harbor of refuge, he necessarily assumes that the abuse he chose to heap upon the police officer cannot be defined as "fighting words." At this juncture, the persuasiveness of appellant's advocacy wanes perceptibly.

[1] The word "of," as it appears the second time in the second paragraph of the syllabus in *Hoffman*, is a printer's error. The word should be "or."

The doctrine of "fighting words" has its roots in *Cantwell* v. *Connecticut* (1940), 310 U. S. 296. There, the defendants were attempting to influence others to adopt a particular religious philosophy. Unfortunately, their efforts included the playing of a phonograph record which was highly insulting to another religious group. Two members of the latter faith were incensed by the record and the defendants were arrested. In reversing the convictions, Mr. Justice Roberts noted, at page 309:

"One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

Two years later, in *Chaplinsky* v. *New Hampshire* (1942), 315 U. S. 568, Mr. Justice Murphy alluded to the term "fighting words." Interestingly, this case involved the same religious sect as did *Cantwell, supra.* Defendant Chaplinsky was enthusiastically dispensing his belief that all religion was a "racket," and doing so upon a public sidewalk. The assembled listeners began "getting restless" and a traffic officer thereupon escorted Chaplinsky toward the police station. As they neared city hall, the town marshal met them and the defendant proceeded to indulge himself in some epithets of questionable taste. He referred to the marshal as a "racketeer," a "damned fascist," and to the entire government of the city of Rochester as

"fascists or agents of fascists." His conviction for the outburst was upheld by the Supreme Court, and in the opinion, at page 571, it is observed:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Recently, the defendant in *Cohen* v. *California* (1971), 403 U. S. 15, expressed his disenchantment with our government's late policy of compulsory military service by wearing a jacket, across the back of which was inscribed, "Fuck The Draft." He was arrested while wearing the jacket in a public building in the presence of women and children. In writing the majority opinion reversing Cohen's conviction, Mr. Justice Harlan observed, at page 20:

"This court has also held that the states are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. * * * [Citing *Chaplinsky* v. *New Hampshire, supra.*] While the four-letter word displayed by Cohen in relation to the draft

is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.' * * * [Citing *Cantwell* v. *Connecticut*, *supra*.] No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult."[2]

It is obvious to us that the epithets shouted by the instant appellant were unmistakably in the "fighting" category.[3] Even recalling that in 1941 Fascism was considered among the ultimate of evils, it is difficult to imagine more inflammatory and personally abusive insults than those emitted by the appellant at bar. This is particularly so when the circumstances surrounding their utterance are considered.

Appellant nevertheless maintains that the officer's own testimony establishes his failure to be moved to anger or violence, though his face did become flushed. Hence, runs appellant's theory, these were not fighting words to this particular individual and the speech was constitutionally protected. We disagree with this reasoning.

Perusal of United States Supreme Court cases permits the conclusion that the high court has adopted an objective test for determining the "fighting" nature of words. In addition to the foregoing quote from *Cohen*, the opinion in *Chaplinsky* states, at page 574:

"Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argu-

---

[2] See, also, *Gooding* v. *Wilson* (1972), 405 U. S. 518.

[3] For this reason, we need not explore the theory that appellant's conduct was central to the facts of this cause, the speech being only ancillary thereto.

ment is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."

To ignore that "average person" touchstone and select the subjective standard urged by appellant would only serve to exacerbate existing perplexities in this currently sensitive and tumultuous area of constitutional law.

Appellant's final proposition points to an error committed by the prosecutor in his cross-examination of the defendant and in his examination of a defense witness. Each of the two instances concerned whether or not the appellant had been "arrested" in the past because of his alleged involvement in an assault and battery.

The trial court erred in overruling the appellant's objections to those questions and the prosecutor should have been reprimanded for posing them. However, the error was harmless. We have examined the entire record of the proceedings below and can find no reasonable doubt of the appellant's guilt. *Chapman* v. *California* (1967), 386 U. S. 18. The evidence upon which the jury obviously based its conviction leaves no room for a finding that these two questions in any way served to deny appellant his fundamental right to a fair trial by an impartial tribunal.

In view of all the foregoing, the judgment of the Court of Appeals is affirmed.

*Judgment affirmed.*

O'NEILL, C. J., CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

## APPENDIX C

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

---

No. C-72061

---

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

STEPHEN KARLAN,
Defendant-Appellant.

---

## DECISION

---

Miss Isabel Guy and Messrs. Ralph E. Cors and John W. Dressing for Plaintiff-Appellee,
Mr. Andrew B. Dennison for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries and original papers from the Hamilton County Municipal Court, the transcript of the testimony and evidence, the assignments of error, the briefs and arguments of counsel.

Upon consideration thereof, the Court finds that the first assignment of error is not well taken because Section

901-d4, Code of Ordinances of the City of Cincinnati, Ohio, is not unconstitutional upon its face or as applied in the case at bar. It does not lack ascertainable standards of guilt, nor is it vague or overbroad, and does not prohibit the lawful exercise of any constitutional right of the lawful enjoyment of any constitutionally protected freedom.

Further, the Court finds that the second assignment of error is not well taken. The record fails to support a conclusion that the testimony referable to a prior "arrest" was such as to amount to a denial of due process of law to the accused not, in light of the admonitions and instructions of the trial judge, such as to prejudice the accused before the jury and to require the declaration of a mistrial. After consideration of all the evidence, the abberration in the form of the questions eliciting the responses as to a prior "arrest" is not sufficient to constitute prejudicial error warranting reversal of the verdict and judgment.

Further, the Court finds that the third assignment of error is not well taken because the testimony is competent as bearing upon the credibility of the accused, and the instructions to the jury relating to the consideration to be given thereto were correct.

Therefore, the judgment of the Hamilton County Municipal Court is affirmed.

HESS, P. J., YOUNG and SHANNON, J.J.

## APPENDIX D

Form MC-169 IM 5-59

State of Ohio )
County of Hamilton ) ss
City of Cincinnati )

No. 71841

CITY OF CINCINNATI,

Plaintiff,

vs.

STEVE KARLAN,

Defendant.

## VERDICT

We, the jury in this case being duly impaneled and sworn, do find the Defendant Guilty of unlawfully and wilfully conducting himself in a noisy, rude and insulting manner, with intent to annoy some person, as charged in the affidavit.

(Signed by twelve jurymen)

/s/ JOHN SHOEMAKER
Foreman

## APPENDIX E

Copy of Affidavit of James Ward Alleging Offense
(Filed January 19, 1971)
Form 10 Rev. 1-19-68

STATE OF OHIO )
HAMILTON COUNTY ) SS:
CITY OF CINCINNATI )

### AFFIDAVIT

### HAMILTON COUNTY MUNICIPAL COURT

James Ward, being first duly cautioned and sworn, deposes and says that Steve Karlan, on or about the 1-19-71, 5:05 P.M., in the City of Cincinnati, Hamilton County and State of Ohio, did unlawfully and wilfully conduct himself in a noisy, rude and insulting manner, with intent to annoy some person, contrary to and in violation of Section 901-d4 of the Code of Ordinances of the City of Cincinnati.

/s/ JAMES WARD

Sworn to, subscribed before me, and filed in this Court this 1-19-71.

ROBERT D. JENNINGS

Clerk of the Hamilton County Municipal Court
By /s/ MELVIN B. FIELDS

Deputy Clerk

## APPENDIX F

---

### FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

## SECTION 901-D4, CINCINNATI MUNICIPAL CODE

**§ 901-D4. Disorderly Conduct.**

No person shall wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city or any portion thereof, or disturb the peace, good order and quiet of the city by provoking or engaging in a fight or quarrel, or permit or suffer such act or acts made unlawful herein to be committed on or about his or her house, or any premises attached thereto.

For the purpose of enforcing the provisions of this section, it shall be lawful for any officer to enter any house, outhouse, garden or place of amusement to arrest any person violating any of the provisions of this section.

Whoever violates this section shall be fined not more than one hundred dollars ($100.00), or imprisoned not more than thirty (30) days, or both, for a first offense, and for a second or subsequent offense shall be fined not more than one hundred dollars ($100.00), or imprisoned not more than ninety (90) days, or both.

(C.O. 901-d4; a. Ord. No. 255-1963, eff. July 3, 1963)

## APPENDIX G

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## PERTINENT PORTIONS FROM THE TRIAL COURT'S INSTRUCTIONS TO THE JURY, HAMILTON COUNTY MUNICIPAL COURT, CRIMINAL DIVISION

The City accuses the defendant of violating the provisions of Section 901 D4 of the codified ordinances of the City of Cincinnati and its appropriate provisions. It reads as follows: "It shall be unlawful for any person to (Record p. 141) wilfully conduct himself in a noisy, boisterous, rude, insulting or other disorderly manner with the intent to abuse or annoy any person or the citizens of the city or any portions thereof." Specifically and under that section an affidavit was filed which reads as follows: "James Ward, being first duly sworn and cautioned; and deposes and says that Steve Karlan on or about the 1-19-71, 5:05 p.m., in the City of Cincinnati, Hamilton County, State of Ohio, did unlawfully and wilfully conduct himself in a noisy, rude and insulting manner with intent to annoy some person, contrary to and in violation of 901 D4." Before you can find the defendant guilty of disorderly conduct, the City must prove the following essential elements beyond a reasonable doubt: One — that the defendant conducted himself in a noisy, rude or insulting manner. That he did so with intent to abuse and annoy the citizens of the City of Cincinnati. That he did so unlawfully, that he did so wilfully, and that the offense, if any, was committed in the City of Cincinnati, State of Ohio. There has been no contrary testimony, I charge you then on the matter of venue, that is the geographic location of the incident which resulted in this prosecution, is in the City of (Record p. 142) Cincinnati. Therefore, you have but

four essential elements to determine and resolve; noisy, rude and insulting are words in the common vocabulary of every citizen and require no specific definition. Intent legally means a decision of the mind to knowingly do and act with a conscious objective of accomplishing a specific result. To this extent, intent and purpose mean the same thing. The intent with which a person does an act is usually known only to himself and as he expresses it to others or indicates it by his conduct. A person is presumed to intend the reasonable and natural consequences of his voluntary acts, unless his actions are otherwise explained by the evidence. The intent with which a person does an act is determined from the manner in which it is done and all other facts and circumstances in evidence.

Unlawful means in violation of the law. At this point, the Court finds it necessary to interpolate by virtue of by an event in another location which has received publicity during the course of this trial concerning which with perfect respect for and adherance (sic) to the admonition of the Court you might have heard. I have reference to the fact that the Supreme Court of the United States has agreed to review the (Record p. 143) provisions of the City of Cincinnati disorderly conduct ordinance. This is not to affect you, in any way, in your deliberations. I charge you that as of the date of this offense and as of the date of this trial, the City of Cincinnati section prescribing disorderly conduct is a valid and constitutional act.

The final essential element is: Did the defendant wilfully conduct himself in such a manner, wilfull is defined that the defendant knew what he was doing and voluntarily decided to do it without regard of the law or rights of others. Wilfullness is determined from the manner in

which the act was performed and from all of the other facts and circumstances in evidence. If you find that the defendant did so conduct himself in a noisy, rude and insulting manner, that he did so with intent to annoy some person, that he did it unlawfully and wilfully, if you find each one of those facts proven beyond a reasonable doubt, then your duty must be to return a verdict of guilty. (Record p. 144).

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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-387

STEPHEN KARLAN,

Petitioner,

v.

CITY OF CINCINNATI,

Respondent.

**On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MR. THOMAS A. LUEBBERS
City Solicitor

MR. PAUL J. GORMAN
Municipal Court Prosecutor

MS. DOLORES JECHURA HILDEBRANDT
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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1974

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No. 74-387

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STEPHEN KARLAN,

Petitioner,

v.

CITY OF CINCINNATI,

Respondent.

---

**On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio**

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

## OPINIONS BELOW

The opinion of the Supreme Court of Ohio following vacation and remanding by the United States Supreme Court is reported at 39 Ohio St. 2d 107, 314 N.E. 162 (1974) and reproduced in Petitioner-Appellant's brief as Appendix A therein. The first opinion of the Supreme Court of Ohio is reported at 35 Ohio St. 2d 34, 298 N.E. 2d 573 (1973), and reproduced within Petitioner's writ therein as Appendix B. The opinion of the Court of Appeals for the First District Court of Appeals, Hamilton County, Ohio, is unreported and reproduced within Petitioner's writ as Appendix C.

## STATEMENT OPPOSING JURISDICTION

### Loss of Jurisdiction by Mootness

The Appellee in the above-entitled case respectfully advises the Court of certain facts which in Appellee's view, render this cause moot.

## MEMORANDUM OF APPELLEE SUGGESTING THAT THE CAUSE IS MOOT

The questions which Appellant Karlan seeks to raise on this petition for a writ of certiorari are threefold:

I. Whether Section 901-D4, Cincinnati Municipal Code, which provides that it is "unlawful for any person to wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner with the intent to abuse or annoy any person," as written and as applied to speech, is repugnant to the First and Fourteenth Amendments of the Constitution of the United States, as vague and overbroad in its restraint upon the freedom of speech, where the ordinance at the time of the offense had not been judicially interpreted by any Ohio Court to be confined to a narrow and limited class of speech not entitled to constitutional protection.

II. Whether the Supreme Court of Ohio, upon Judicial review and construction of Section 901-D4, Cincinnati Municipal Code, creating a new criminal sanction penalizing speech in the "fighting" category, may apply that judicial interpretation and criminal sanction retroactively against Petitioner in affirming his conviction and sentence without denying to Petitioner his rights under the due process clause of the Fourteenth Amendment of the Constitution of the

United States on the basis that Petitioner was afforded no fair notice at the time of the offense of the subsequent creation of a new criminal sanction.

III. Whether the Supreme Court of Ohio's creation of a new criminal sanction through its judicial construction of Section 901-D4, Cincinnati Municipal Code, to punish speech as a criminal act utterances which inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace, is repugnant to the First and Fourteenth Amendments of the Constitution of the United States as vague and overbroad in its restraint upon the freedom of speech.

These three questions necessarily relate to the existence of Section 901-D4, Disorderly Conduct ordinance of the Cincinnati Municipal Code. This ordinance which is the basis for the action complained of his been effectively *repealed* on December 31, 1973, and is no longer an offense with criminal sanction. (emphasis added)

It is thus apparent that there is no occasion for this Court to pass upon questions which have no relevance. Jurisdiction does not lie with respect to the instant petition presented by Appellant for the reason that said Disorderly Conduct ordinance has been abandoned. The United States Supreme Court has jurisdiction only over actual cases and controversies between adverse interests. The questions presented by Appellant become academic by reason of absence of controversy and effective termination of subject ordinance.

Appellant Karlan has no standing to complain of the abandonment of the ordinance in question and he likewise has no standing to request that this Court issue an advisory opinion on the questions presented. In other

words, the Appellant is now seeking to invoke the jurisdiction of this Court on abstract questions. This he may not do.

The Supreme Court will determine only actual matters in controversy essential to the decision of the particular case before it, and where a subsequent law has come to an end the case becomes moot and will be treated accordingly. *United States et al.* v. *Alaska S. S. Co. et al.*, 40 S. Ct. 448, 253 U.S. 113 (1920). Wherefore jurisdiction falls with the abrogation of the statute upon which it is founded.

For these reasons, Appellee suggests that the issues sought to be raised are moot as to the Appellant Karlan and that the petition for writ of certiorari to the Supreme Court of Ohio should be dismissed on that ground.

## QUESTIONS PRESENTED

### I.

THE SUPREME COURT OF OHIO THROUGH ITS JUDICIAL CONSTRUCTION OF SECTION 901-D4, DISORDERLY CONDUCT, CINCINNATI MUNICIPAL CODE, COMPLIED WITH THE PROSCRIBED MANDATE ENUNCIATED BY THE UNITED STATES SUPREME COURT IN ACCORDANCE WITH THE CONSTITUTIONAL PENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

### II.

THE SUPREME COURT OF OHIO UPON JUDICIAL REVIEW AND CONSTRUCTION OF SECTION 901-D4, CINCINNATI DISORDERLY CONDUCT ORDINANCE DID NOT CREATE A NEW CRIMINAL SANCTION FOR THAT CLASS OF CONDUCT WAS NEVER AFFORDED CONSTITUTIONAL PROTECTION AND PETITIONER WAS AFFORDED FAIR NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the First and Fourteenth Amendments of the Constitution of the United States and Section 901-D4, Disorderly Conduct, Cincinnati Municipal Code, are reproduced and set forth within the Appendix F of petitioner's writ therein.

## STATEMENT OF THE CASE

There is no doubt that petitioner Karlan's conduct cannot be effectively separated from the unprotected verbalisms employed by him which constitute the subject of this action. To ignore the facts and circumstances surrounding petitioner's use of unprotected speech would circumvent the purpose of First Amendment rights altogether.

On January 19, 1971, at approximately 5:05 p.m., James Ward and Norman Stewart, two Cincinnati police officers, arrived at the District Three stationhouse and drove into the fenced police lot. This area which is adjacent to the police stationhouse was used as a protective lot for motor vehicles which were in police custody. A signed release is necessary before any car or article therefrom can be removed.

As they approached the protective lot the police officers noticed that a man had the hood of an impounded vehicle open and that there was a radiator in Petitioner's hands. Being cognizant of the fact that many robberies had occurred within said police lot, Officer Ward approached the Petitioner-Appellant to investigate. As the uniformed officer approached the impounded vehicle Petitioner-Appellant spoke first and said "Who are you looking at?"

Officer Ward asked the Petitioner if he had obtained the necessary release from the police district. At this time the officer also explained to instant Petitioner the procedures and purpose necessitating the acquisition of said release and that such a release was a prerequisite to any removal of automobile parts.

It was at this point that Petitioner-Appellant herein yelled, "I hate all of you fucking cops." Because the appellant appeared "wild", Officer Ward attempted to calm him

by once again inquiring whether he had obtained a permissive release. Appellant's response was "Get out of my way you fucking, prick-ass cops." Officer Ward then closed the hood of the vehicle and once more told Petitioner-Appellant that he needed the proper release before he could touch the impounded vehicle. At this time Officer Ward also cautioned him not to use any additional foul language. With this, Appellant called Officer Ward a "prick-assed cop."

It is uncontradicted that Officer Ward again attempted to calm instant Petitioner by cautioning him "not to use any more foul language." Appellant's response was, "Prick-assed cop." After the fourth epithet directed towards him, Officer Ward then explained to the Appellant that he was under arrest.

Petitioner Karlan was on a police secured area. At no time did he possess a release in order to remove parts from an automobile in police custody. Said vehicle *did not* belong to defendant and Karlan *gave no* explanation for removing auto parts from a police lot. (Emphasis)

Subsequently, Petitioner was tried and convicted by a jury of his peers and said convictions was affirmed by the First District Court of Appeals, Hamilton County, Ohio, and thereafter by the Ohio Supreme Court.

This Court vacated the judgment and remanded the case to the Supreme Court of Ohio for further consideration in light of *Lewis* v. *New Orleans* (1974). The Ohio Supreme Court in reconsidering applied and followed the specific mandate enunciated by this Court.

**THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION HEREIN INVOLVED AND THIS CASE IS NOT OF GREAT OR GENERAL PUBLIC INTEREST.**

Clearly, this case does not involve any constitutional question for these exact issues have been previously decided in *Lewis* v. *City of New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974). This case was remanded to the Supreme Court of Ohio for consideration in light of *Lewis*. On remand the Supreme Court of Ohio applied and construed the *Lewis* decision in accordance with this Court's mandate. The Ohio Supreme Court *did* narrow and refine the words of the ordinance and construed it as *not* being susceptible of application to protected speech, although vulgar or offensive. (Emphasis added) *City of Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974)[1].

Unlike the Louisiana Supreme Court in *Lewis*, the Ohio Supreme Court has complied with the constitutional necessity of limiting this type of ordinance to words which;

> "by their very utterance inflict injury or tend to incite an immediate breach of the peace."

*Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). This principle was again enunciated in *Lewis* v. *New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974), and the Ohio Supreme Court has construed the Cincinnati Disorderly Conduct Ordinance as within the constitutional pronouncements of the United States Supreme Court.

Instant case involves conduct coupled with speech which is clearly within the peripheria of the narrow'y construed

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[1] The opinion of the recent decision of the Ohio Supreme Court upon remand in light of *Lewis* is reproduced within petitioner Karlan's memorandum therein as Appendix A at 1a.

ordinance and never did fall within that class of constitutionally protected speech and conduct. The right of free speech, while fundamental in our democratic society was not intended by the framers of the Constitution to make a course of conduct unpunishable merely because the conduct was in part initiated by means of language. *Cox* v. *Louisiana*, 379 U.S. 536 (1965)

Wherefore, in construing subject disorderly conduct ordinance the Ohio Supreme Court did not create a retroactive legal rationale but only limited the application of the ordinance to instances where there is no protected right. The decision below turns upon its own facts, and it will affect no one in view of said narrow construction and the abandonment of said ordinance from criminal sanction.

Consequently the now narrowly construed disorderly conduct ordinance clearly provides fair notice of what is prohibited by clear and explicit standards. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971)

The Supreme Court of Ohio has complied with the mandate of this Court and consequently petitioner's questions are moot. Furthermore, this cause lacks importance because the non-existence of said ordinance would affect no one and cannot be regarded as bearing any semblance to a constitutional question.

## ARGUMENT FOR DENIAL OF WRIT

### I.

### THE SUPREME COURT OF OHIO THROUGH ITS JUDICIAL CONSTRUCTION OF SECTION 901-D4, DISORDERLY CONDUCT CINCINNATI MUNICIPAL CODE, COMPLIED WITH THE PROSCRIBED MANDATE ENUNCIATED BY THE UNITED STATES SUPREME COURT IN ACCORDANCE WITH THE CONSTITUTIONAL PENUMBRAS OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Cincinnati Disorderly Conduct Ordinance as recently narrowed by the Ohio Supreme Court has been limited to words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974). In finding that petitioner's language constituted "fighting words" the Ohio Supreme Court also construed the ordinance as limited to such words and rendered said ordinance unsusceptible of application to protected speech. The Ohio Supreme Court upon reconsideration stated that:

> "Persons may not be punished under Section 901-D4, Code of Ordinances of Cincinnati, for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words by their very utternance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace."

*Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974).

Petitioner's questions are now moot for the Ohio Supreme Court has specifically complied with this Court's mandate and said ordinance cannot be attacked as being repugnant to the First and Fourteenth Amendments of the Constitution of the United States. Speech no matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobious, may not be made a crime unless they are fighting words and unsusceptible of application to protected speech. *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974); *Lewis* v. *New Orleans*, 415 U.S. 130, 39 L. Ed. 2d 214 (1974)

It is emphasized that the facts and issues raised in this cause are identical to those facts and issues already decided by this Court in *Lewis* v. *New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974). In keeping within the guidelines as set forth by this Court in *Lewis* and as applied to this case, it is clear that the conduct and epithets emitted under the set of facts and circumstances now before this Court do not fall within the purview of any constitutionally protected freedom.

Unlike *Lewis*, the case at bar does not involve the mere name calling of another individual. Here, there is no dispute that instant petitioner was removing articles from a vehicle not his own and without police authorization. At no time did Karlan explain his conduct in tampering with police protected property. This case does *not* turn on verbal pronouncements alone. (Emphasis added) [2]

Like *Colten* v. *Kentucky*, 407 U.S. 104 (1972), instant petitioner's conduct and speech was not an exercise within

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[2] The facts of this case are almost identical to those in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Colten was arrested for disorderly conduct when he failed to comply with a request given by a police officer. Colten verbally expressed discontent with the officer's request and was then arrested.

the purview of any constitutionally protected freedom. Consequently, there is no basis for distinction between the facts at bar from *Colten.*

It is obvious that petitioner Karlan presents no constitutional question to be decided by the United States Supreme Court.

## II.

**THE SUPREME COURT OF OHIO UPON JUDICIAL REVIEW AND CONSTRUCTION OF SECTION 901-D4, CINCINNATI DISORDERLY CONDUCT ORDINANCE DID NOT CREATE A NEW CRIMINAL SANCTION FOR THAT CLASS OF CONDUCT WAS NEVER AFFORDED CONSTITUTIONAL PROTECTION AND PETITIONER WAS AFFORDED FAIR NOTICE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.**

It is crucial to point out that even though the facts of this case involve verbal epithets, petitioner was not convicted upon his verbal expressions. The pertinent portions from the trial court's instructions to the jury are reproduced at page 24a in Appendix G of petitioner's writ.

From these instructions it is obvious that the entire charge to the jury emphasized defendant's conduct and did not rely upon speech[3] At no time during the trial or within

[3] "The final essential element is: Did the defendant wilfully *conduct* himself in such a manner, wilful is defined that the defendant knew what he was doing and voluntarily decided to do it without regard of the law or rights of others. Wilfulness is determined from the manner in which the *act* was performed and from all of the other facts and circumstances in evidence. (emphasis added)

the trial court's charge to the jury was it indicated that said defendant could be found guilty by words alone. This factor is important for even though this Court found that the Cincinnati Disorderly Conduct ordinance must be construed in light of *Lewis*, defendant's conviction did not turn on speech.

Precisely, petitioner Karlan was afforded "fair notice" and no "retroactive" criminal action is being applied to this case. Instant petitioner's conduct in removing auto parts from a vehicle not his own and in police custody does not involve First Amendment rights. Defendant did not have police authorization to tamper with police property and could produce no explanation for his presence on a secured police area. These were the primary factors which led to petitioner Karlan's arrest. The vulgar epithets and "fighting words" were only incidental to this cause.

The Cincinnati Disorderly Conduct Ordinance does not punish only spoken words as did the ordinance in *Lewis* v. *City of New Orleans*, 415 U.S. 130, 39 L.Ed. 2d 214 (1974), and is therefore clearly distinguishable from this cause. Subject ordinance withstands petitioner's attack for as authoritatively construed by the Ohio Supreme Court in *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107, 314 N.E. 2d 162 (1974), it is not susceptible of application to protected speech. The importance of speech in relation to the exposition of ideas cannot be over-emphasized.

The speech uttered by petitioner Karlan to the arresting officer was clearly "fighting". *Cincinnati* v. *Karlan*, 39 Ohio St. 2d 107 (1974). It therefore is within the reach of the ordinance as narrowed by Ohio's highest Court in accordance with *Lewis*. The ordinance, moreover, poses no threat to protected speech.

## CONCLUSION

For the reasons set forth above, certiorari should be denied.

Respectfully submitted,

MS. DOLORES JECHURA
HILDEBRANDT

Asst. Municipal Court Prosecutor
City of Cincinnati, Ohio

COUNSEL ON BEHALF OF
RESPONDENT